No. 11,102

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BEN LIEBMAN, also known as B. Liebman, MASSACHUSETTS BONDING AND INSURANCE COMPANY (a corporation),

Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit of California Electric Supply Company (a corporation),

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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JURISDICTION.

This suit was filed in the District Court of the United States for the Northern District of California, Southern Division, on the 10th of May, 1944. (Tr. p. 9.)

Plaintiff, a materialman, seeks by its complaint to enforce a liability upon the defendant, a general contractor on a public housing project, and his surety, allegedly imposed by virtue of the provisions of the

Miller (Heard) Act, Title 40 U.S.C.A., section 270, et seq. (Tr. p. 2-9.)

Defendants' answer setting up special defenses was filed on the 13th of June, 1944. (Tr. p. 18.)

Jurisdiction to review the judgment of the Court below is conferred by Title 28, section 225 of the United States Code.

The final judgment of the District Court from which the appeal was taken was entered on February 12, 1945. (Tr. p. 23.)

Defendants' motion for new trial was denied March 19, 1945. (Tr. p. 24.)

The notice of appeal was served and filed in the District Court on April 20, 1945. (Tr. p. 25.)

A designation of points on which appellants intend to rely on appeal was served and filed in this Court on April 20, 1945. (Tr. p. 28.)

A designation of contents of record on appeal was served and filed in this Court on April 20, 1945. (Tr. p. 28.)

An order extending time to July 9, 1945, to file record on appeal in the United States Circuit Court of Appeals, Ninth Circuit, was entered by the District Court on May 29, 1945. (Tr. p. 30.)

An order further extending time to July 19, 1945, to file record on appeal in the United States Circuit Court of Appeals, Ninth Circuit, was entered by the District Court on July 9, 1945. (Tr. p. 30.)

Certificate evidencing the filing of the record on appeal dated July 18, 1945. (Tr. p. 62.)

Order enlarging time to file appellant's opening brief to Nov. 21, 1945, dated Oct. 19, 1945.

STATEMENT OF THE CASE.

This is a materialman's suit for a money judgment brought under the Miller Act (Title 40, Sec. 270 (a) (b) U.S.C.A.)

The complaint in one count alleges that material amounting to $1438.52 was furnished by the plaintiffs to the Aetna Electric Company, a sub-contractor of the defendant Ben Liebman, a general contractor; that the material was not paid for; that "Notice to Withhold Payment" and other jurisdictional requirements of the Miller Act had been complied with. (Tr. p. 2-6.)

The defendants' answer admitted a great part of the complaint, and alleged affirmatively that prior to the time the suit was filed, defendant Liebman, at the express request, direction and consent of the plaintiff, had paid the said sum of $1438.52 under the terms of a written stipulation executed by all parties concerned to the trustee of the bankrupt Aetna Electric Company to be held by him as a special fund pending determination of the Bankruptcy Court of the merits of plaintiff's preferred claim filed in such Court to such sum. That compliance with said stipulation was a payment of the alleged indebtedness, and

that the plaintiff, by inducing and consenting to such a mode of payment had waived the rights conferred by the Miller Act, and was now estopped from asserting such rights, if any.

The facts are undisputed.

The appellant (also referred to as defendant) Ben Liebman, in February, 1943, entered into a contract with the United States of America to construct a certain public housing project in Alameda County, California. The appellant, Massachusetts Bonding and Insurance Company, was the surety on Liebman's performance bond. (Tr. p. 4.)

The appellee (also referred to as plaintiff), California Electric Supply Company, was during all times herein mentioned engaged in the sale of electrical supplies.

In the process of the fulfillment of the public housing contract the defendant Liebman had several subcontractors, one of which was the Aetna Electric Company. During February, March and April, 1943, the plaintiff sold and delivered to the Aetna Electric Company to be used on the contract electrical supplies amounting to the sum of $1438.52. The Aetna Electric Company encountered financial difficulties and was unable to pay this sum. (Tr. p. 32.) On May 24, 1943, the plaintiff, realizing the financial position of the Aetna Company, and proceeding under the provisions of the Miller Act (40 U.S.C.A., Sec. 270 (a), filed a statutory notice, "Notice to Withhold Payment" (Plaintiff's

Exhibit 11), on the defendant Leibman, his surety, and the United States Engineers. (Tr. p. 33.)

In August, 1943, the Aetna Electric Company, being unable to compromise its obligations, filed its petition in bankruptcy. (Tr. p. 37.)

Immediately, in the Aetna Electric bankruptcy matter, the plaintiff filed a claim against the estate of the bankrupt for the $1438.52 supported by the "Notice to Withhold" that it had served on the defendants, contending that such claim by virtue of the Miller Act was a preferred claim in such Bankruptcy Court. A formal hearing was held on the claim in which the plaintiff California Electric Supply Company presented its case on the merits of the claimed preference and briefs were submitted. (Tr. p. 39.) Neither the defendant, nor his surety, appeared before the Bankruptcy Court. (Tr. p. 41.)

After briefs were filed, the referee in Bankruptcy refused to rule on the disputed priority of the claim on the ground that the question was moot since the fund was not then before the Court. (Tr. p. 39.)

The defendant Liebman, against whom the plaintiff and the trustee of the bankrupt Aetna had made claims, had been refusing to pay the $1438.52 until there was an agreement between the rival claimants or an order of Court as to whom the money should be paid. (Tr. pp. 39, 17; Defendants' Exhibit 2A.) In an informal discussion of this dilemma between Mr. Mancuso, as attorney for the plaintiff, the trustee of bankrupt Aetna and the referee, it was decided that

Mr. Mancuso, as attorney for the plaintiff, should try to get the money paid to the trustee as a special fund since Liebman was willing to pay if he were properly protected. Mr. Mancuso was to call defendant Liebman's counsel and arrange the payment to the trustee as an "earmarked" fund under a stipulation to be signed by all parties and to represent to the defendant Liebman that by so voluntarily paying, he would avoid the necessity of a suit. (Tr. p. 40-41.)

Apparently confident of his legal position that his client's claim was a preferred one, and in order to avoid further effort in its collection, Mr. Mancuso, as attorney for the plaintiff, contacted Mr. Haughey, attorney for the defendant, and suggested that a stipulation be prepared and executed by all interested parties and that the $1438.52 be paid to the trustee to be held by him pending a ruling by the Bankruptcy Court. (Tr. p. 42.) Testimony by Mr. Mancuso as to the intended purport of the proposed stipulation was stricken. (Tr. p. 42.)

Mr. Haughey testified that Mr. Mancuso called him by phone proposing that a stipulation be entered into between the California Electric Supply Company, the trustee of the bankrupt Aetna Electric Company, and Ben Liebman, providing that Liebman pay the sum to the trustee to be "earmarked" for further order of the Bankruptcy Court. (Tr. p. 53.)

While Mr. Mancuso did not recall that he prepared the stipulation (Tr. p. 48), Mr. Haughey's testimony (Tr. p. 54) and the contents of a letter from Mr.

Mancuso to Mr. Haughey enclosing the prepared stipulation (Defendants' Exhibit A3; Tr. p. 68; Tr. p. 49) conclusively show that Mr. Mancuso authored the stipulation and forwarded it to Mr. Haughey. Mr. Haughey forwarded the stipulation to his client, defendant Liebman, for execution and compliance. (Tr. p. 54.)

It was admitted that the stipulation was executed and the $1438.52 was paid by defendant Liebman to the trustee of the bankrupt pursuant thereto. (Tr. p. 45.)

The defendants' defenses to this action are based upon the facts surrounding the conception of the stipulation, its legal effect, and Liebman's voluntary good faith compliance therewith. Because of its importance it is here set out in full:

"EXHIBIT 'A'

"In the Southern Division of the United States District Court for the Northern District of California

"No. 35800-R-In Bankruptcy

"In the Matter of Aetna Electric Co., a corporation, Bankrupt.

"STIPULATION

"It is hereby stipulated by and between Ben Liebman, California Electric Supply Company, a corporation, and John O. England, as Trustee in Bankruptcy of the above bankrupt corporation, as follows:

1.

"That Ben Liebman is indebted to Aetna Electric Co., the above named bankrupt corporation in the sum of $3230.67 and that California Electric Supply Company, a creditor of said bankrupt corporation, has filed its proof of claim in the sum of $1438.52 to which said proof of claim is attached a copy of a Notice addressed to said Ben Liebman to withhold payment of said amount owing by him to the bankrupt corporation being a portion of his total indebtedness of $3230.67.

2.

"That John O. England, as Trustee, has made demand upon Ben Liebman for the payment of said sum of $3230.67 and the said Ben Liebman has refrained from making payment of $1438.52 of said amount upon advice of his counsel on account of said Notice of California Electric Supply Company, a corporation, to withhold referred to in the preceding paragraph.

3.

"That California Electric Supply Company, a corporation, consents that said sum of $1438.52 be paid by Ben Liebman to John O. England, as Trustee in Bankruptcy, providing he agrees to hold said entire sum until the further Order of the above entitled Court.

4.

"That John O. England, as Trustee in Bankruptcy, agrees with Ben Liebman and California Electric Supply Company, a corporation, to accept the sum of $1438.52 from Ben Liebman and

to hold the entire amount until the further Order of the above entitled Court.

"Dated this 29th day of December, 1943.

"B. Liebman
California Electric Supply Company, a corporation,
By Edward T. Mancuso
Its Attorney

John O. England
Trustee of the bankrupt Estate of Aetna Electric Co., a corporation."

Subsequently, the Bankruptcy Court ruled that the plaintiff's claim to the "earmarked" $1438.52 was not a preferred one, and on appeal the Federal District Court affirmed the Referee. (Tr. p. 43.) Neither of the defendants was present at either hearing and did not participate therein. (Tr. p. 43.)

After the adverse ruling of the Bankruptcy Court, and spurning its rights as a common creditor in the Aetna Electric Company bankrupt estate where it would have realized but twenty-five cents on the dollar on its claim (Tr. p. 44), this suit was then filed by plaintiff to require the defendant Liebman to pay the $1438.52 a second time.

SPECIFICATION OF ERRORS.

1. The District Court erred in granting judgment for the plaintiff;

2. The District Court erred in ruling that the written stipulation entered into between the plaintiff and the defendant Liebman and the trustee in bankruptcy did not release the defendant Liebman and his surety Massachusetts Bonding and Insurance Company from the obligation sued upon;

3. The District Court erred in ruling that the Miller Act (40 U.S.C.A. 270(b)) is a special suretyship right;

4. The District Court erred in holding that the written stipulation entered into between the plaintiff and the defendant Liebman and the Trustee in Bankruptcy did not constitute a waiver by the plaintiff of its rights under the Miller Act (40 U.S.C.A. 270(b));

5. The District Court erred in ruling that upon the facts and the law plaintiff had shown a right to recovery;

6. The District Court erred in failing to hold that the defendants had previously paid the alleged indebtedness sued upon;

7. The District Court erred in not holding that the defendants had, prior to this suit, extinguished the obligations imposed upon them by the Miller Act, by defendant Liebman's good faith compliance with the terms of the stipulation;

8. The District Court erred in failing to hold that the plaintiff by instigating and participating in the

stipulation waived its rights under the Miller Act and was estopped from seeking its benefits;

9. The District Court erred in its findings of fact and conclusions of law in holding that the Stipulation did not constitute (a) a receipt of payment and satisfaction; (b) a waiver of rights under the Miller Act; (c) a release; and (d) an equitable estoppel.

SUMMARY OF ARGUMENT.

A.

The Circuit Court of Appeals is not here obliged to accept the findings of fact and conclusions of law of the trial Court. No advantage was had by the trial Court in hearing and seeing the witnesses as all material facts are uncontroverted. The effect of the written stipulation when considered with the conduct of the parties was the only issue before the trial Court and such Court clearly erred in the construction it placed thereon. It is the duty of this Court to reverse the judgment as a matter of law.

B.

The defendant Liebman, by complying with the terms of the stipulation and by paying the sum demanded to the trustee of the bankrupt Aetna Electric as directed by the plaintiff, fully extinguished the obligation.

C.

Defendant Liebman had informed the plaintiff and the trustee of the bankrupt Aetna Electric Company that he would pay the $1438.52 when he was advised as to how it should be paid and which one of them was entitled to payment. The plaintiff by urging that defendant Liebman execute a stipulation prepared by it; by procuring payment by defendant Liebman of the $1438.52 to the trustee according to the terms of the stipulation; by expressly consenting to such a mode of payment; and by creating the impression upon defendant Liebman that his good faith compliance with the terms of the stipulation would result in full satisfaction of the claim—is such conduct as will create an equitable estoppel, and the plaintiff is and should be in equity and good conscience estopped from maintaining this suit to mulct payment from the defendant a second time. That such acts of the plaintiff constitute a waiver of the benefits of the Miller Act.

D.

The stipulation was in law and fact a receipt and release of all claims the plaintiff had against the defendants, and a waiver of rights under the Miller Act. The document, though termed a "stipulation", and whether it be deemed cleverly or ineptly drawn, represented the intent of the parties to adjust all differences. It is immaterial that specific words of release and payment were not used in the agreement, since the interest of the parties was manifest.

E.

Plaintiff's "Notice to Withhold", a statutory prerequisite under the Miller Act, effectively prevented defendant Liebman from paying the amount claimed to anyone unless consent was obtained from the plaintiff. By the terms of the stipulation that consent was granted. The statutory notice was therefore in effect withdrawn or waived. Since there was no subsequent statutory notice filed and nothing done to revitalize the only notice, the jurisdictional prerequisites of the statute were not complied with and this suit must fail.

ARGUMENT.

A.

The appellants are aware of the consideration justly placed on the findings of a trial Court by an appellate tribunal. This is a proper rule as it is based upon the fundamental principle that a Court which sees and hears witnesses is in a better position to decide disputed questions of fact.

In the instant case no such advantage was had by the trial Court as there was no material dispute of the facts. There was some variance in the recollection of the lawyer witnesses as to the conversation had prior to the execution of the written instrument. But this discrepancy was eliminated by the action of the trial Court in striking such testimony from the record. (Tr. p. 42.)

Therefore, this Court is in the identical position of the trial Court in passing upon the merits of the case. The effect of the written stipulation when viewed in the light of the conduct, actions and deeds of the parties as disclosed by the evidence, is controlling. Under the circumstances the trial Court's opinion and its findings of fact and conclusions of law can only be advisory, and this Court is not compelled to be persuaded thereby.

In

Equitable Life Assurance Society v. Irelan, 123 Fed. (2d) 462,

this Court considered a case involving the liability of an insurance company where the issue was whether the insured died from accident and stated the rule as to the effect to be given a trial Court's findings where the case was tried by deposition and no opportunity afforded the trial Court in hearing and seeing the witnesses.

at 464:

> "Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that. Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, in the federal courts where

the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings."

In

Smith v. Royal Ins. Co., Ltd., 125 F. (2d) 222,

the Court, in considering a case where the material facts presented were of a documentary character, stated at page 224:

"The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding. Equitable Life Assur. Soc. v. Irelan, 9 Cir., 123 F. 2d 462."

In

In re Chicago & N.W.R. Co., 110 F. (2d) 425,

at 427 the Court said:

"In the instant case the bulk of the record stands on documentary evidence. Although some oral evidence was adduced, it is not conflicting nor does it present a question of credibility of the storyteller. The facts are not in dispute, and in such situations the legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on this court. Nor are the findings conclusive on this court, unless supported by substantial evidence. See Rule 52(a), Federal Rules of Civil Procedure, 28 U.S. C.A., following Sec. 723c."

In

United States v. South Georgia Ry. Co., 107 F. (2d) 3,

the Court was considering the merits of a suit for income tax where the issue was as to whether certain payments made under preferred stock certificates were to be considered as dividends or as payments of interest. At page 3 the Court stated as follows:

> "A copy of one of the certificates, the resolution authorizing their issuance and what has been done, since their issuance, with and in regard to them, appears in the evidence without contradiction or dispute. The case then is not one for the weighing of evidence, and the resolution of testimonial differences, and in which, therefore, we must take the facts as the District Judge has found them, but one for the determination by us of the legal effect of the facts as the record presents them, clearly, simply and without controversy."

Appellants therefore respectfully submit that because of the uncontroverted character of the evidence as here presented the findings of fact and conclusions of law of the trial Court are here only advisory.

B.

Long prior to the bringing of this suit the plaintiff had served a "Notice to Withhold Payment" on the defendants as required by the Miller Act, stating that defendant Liebman's subcontractor, Aetna Electric Company, owed it $1438.52. (Tr. p. 34.) Plaintiff then

filed a claim as a preferred creditor in the estate of the bankrupt Aetna Electric Company and litigated it. (Tr. p. 37.) Defendant Liebman admitting the amount of $1438.52 was due and unpaid, refused to pay the sum until he knew the party entitled thereto, or was authorized so to do by agreement between the parties or an order of Court. (Tr. pp. 39, 17.) When the bankruptcy referee refused to rule on the question of preference because the fund was not before him, plaintiff, through its attorney, undertook to get defendant Liebman to pay. (Tr. pp. 40-53.) The plaintiff, confident in the thought that it would be held a preferred creditor in the bankrupt estate, arranged for and prepared the stipulation, and directed the defendant Liebman to execute it and comply with its terms. (Tr. pp. 48, 53, 57.) Defendant Liebman, in good faith complied wih the provisions of the stipulation and with a bona fide purpose of satisfying the obligation, paid the $1438.52 to the trustee in bankruptcy to be held "earmarked" pending order of the Court on the preferred claim. (Tr. p. 45.)

The fact that the plaintiff did not receive the entire $1438.52, but instead was declared only a general creditor entitled to share at the rate of about twenty-five cents on the dollar, is beside the point. (Tr. p. 44.) Defendant Liebman had done what was agreed upon by the rival claimants to the fund and had performed as he had been directed to do by the plaintiff. By so doing he fully extinguished the obligation. The California Civil Code states this fundamental proposition of law very succinctly.

Section 1476, *California Civil Code,* provides:

> "*Effect of Direction by Creditors.* If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance."

See also:

20 *Cal. Jur.* 909;
8 *Cal. Jur.* 1054.

It can be argued with equal force that payment to the trustee under the stipulation was a payment to the plaintiff's agent and that agency to accept the money was specifically created by the terms of the stipulation. It must follow on this ground that the obligation was fully satisfied.

> "It can hardly be questioned that when a principal appoints an agent and authorizes him to receive money for and on behalf of the principal, that payment has been made to the principal as a matter of law when made to an agent."
>
> *O. A. Graybeal Co. v. Cook,* 111 Cal. App. 518 at 530, 295 P. 1088.

See also:

Burgess v. Security First Nat'l Bank, 44 Cal. App. 808 at 819, 113 P. (2d) 298;
20 *Cal. Jur.* 903.

C.

Whether the stipulation be considered a receipt, a release or a waiver is here immaterial. The plaintiff's acts in the preparation of the stipulation and its conduct in securing its execution and compliance misled the defendant to his prejudice and plaintiff is now estopped from asserting further claim.

The defendant had been refusing to pay until there was an agreement between the rival claimants or an appropriate order of Court. (Tr. p. 39.) The plaintiff in representing that the stipulation prepared by it was a proper, expeditious and satisfactory mode of payment procured such payment by the defendant. (Tr. pp. 53-54.) The plaintiff by taking such position which caused defendant Liebman to move to his detriment is now precluded from taking the contrary stand that plaintiff was at all times reserving his rights under the Miller (Heard) Act.

In

Kansas City Marble & Tile Co. v. Penker Construction Co., 86 Fed. (2d) 287,

the Court considered a suit under the Miller (Heard) Act, where to induce payment to a subcontractor by the general contractor, a materialman executed a "complete waiver of lien". After the payment to the subcontractor, the materialman did not get his share thereof and brought suit contending that the waiver was intended to apply to liens on the building and not a recovery under the statute. The Court, in denying a recovery stated at page 288:

"And we agree with the judge below that petitioner is estopped from asserting a claim against the bond for the materials furnished, since it is clear that petitioner intended by the execution of the waiver to assure the general contractor that petitioner would assert no claim against him for materials furnished and that the general contractor was thereby induced to make settlement with the subcontractor. All parties understood that payments would not be made to the subcontractor so long as claims for materials furnished him might be asserted against the bond; and the waiver was executed by petitioner to be used by the subcontractor in obtaining such payments."

In

United States for Use and Benefit of Noland Co. v. Wood, 99 Fed. (2d) 80,

the Court considered a case almost identical in principle to the case at bar. The materialman plaintiff induced a defendant general contractor to employ a subcontractor who was indebted to the plaintiff and a three-party agreement was entered into. By the agreement the materialman was to furnish materials to the subcontractor; the general contractor was to supervise the subcontractor's payrolls and advance only those sums necessary to meet them and was to hold what remained for the materialman. There was but little profit in the job, and at the completion the general contractor did not have enough money owing the subcontractor to pay for the materials furnished by the materialman. The materialman brought suit under the Miller (Heard) Act. The general contractor de-

fendant admitted indebtedness to the extent of the moneys held pursuant to the agreement. The Court in denying recovery under the statute said at pages 82 and 83:

"Without deciding the question whether the three-way agreement constitutes a waiver of plaintiff's rights under the Heard Act, we are of the opinion that under the agreement the plaintiff is estopped from claiming any rights other than those given by the contract, which the defendant has complied with.

"The doctrine of equitable estoppel is universally recognized by the courts. This doctrine can be applied in actions under the Heard Act. U. S. v. American Bonding & Trust Company, 4 Cir., 89 F. 925, cited with approval in United States Fidelity & Guaranty Company v. United States, 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242. *To establish equitable estoppel it is not necessary that actual fraud be shown. It is only necessary to show that the person estopped, by his statements or conduct, mislead another to his prejudice.*

* * * * * * *

"Parties inducing another to act on reasonable belief that they have waived or will waive certain rights will be estopped to insist on them to his prejudice. Big Vein Pocahontas Coal Company v. Browning, 137 Va. 34, 120 S. E. 247. And estoppel may be prejudiced on representations not made with fraudulent intent, if they are of such a character as to induce a reasonably prudent man to believe that they were intended to be acted upon. American Mutual Liability Ins. Company v. Hamilton, 145 Va. 391, 135 S. E. 21; Richmond Trust Company v. Christian, 150 Va. 244, 142 S. E. 528.

"* * * Here the defendant had every reason to believe that the plaintiff would abide by the terms of the three-party agreement * * *.

"The fact that the contract here in question resulted in a loss to the subcontractor does not change the situation and the plaintiff is estopped from claiming any benefit other than that accruing to it under the three-way contract." (Italics ours.)

D.

The stipulation here was intended by the parties to have been a release and receipt showing payment of the obligation and a waiver of further claims against the defendant. The fact that no such specific words were used or that the document was termed a "Stipulation" is not controlling.

"The agreement of the parties to the instrument that it should be characterized as a 'lease' cannot change its true character. The evident intent and purpose of the parties as disclosed by the terms of the instrument control."

Mahoney v. San Francisco, 201 Cal. 248 at 258.

The Court below in finding for the plaintiff was apparently impressed by the failure of the stipulation to contain the express words "release" or "waiver". (Tr. p. 58.) The conduct of the plaintiff in conceiving of the plan or mode of payment by the defendant, in preparing the document, in inducing the defendant to execute it and pay thereunder and its efforts to reach the specific fund so paid through the Bankruptcy

Court was not discussed by the Court in its opinion. (Tr. pp. 58, 59, 60.) The litigants are in the dark as to whether such facts were or were not considered by the Court as constituting an estoppel or when considered with the document amounted to a waiver. The Court held that the Miller Act created such a special suretyship right that it could only be waived or discharged by express language. The Court did state that defendant Liebman expected that by paying under the stipulation he was extinguishing the obligation, but since there was no specific language to that effect his hopes and expectations were not warranted. It is believed that the Court in deciding the case looked solely to the written document for guidance and omitted to consider that acts and conduct of the parties might or should bear on its interpretation. It is felt that such a strict and narrow basis for decision is not here justifiable.

> "The intent of the parties to a contract is not to be determined by the 'label' of the agreement, but rather is to be gathered by considering all the acts, statements and writings which go to make up the contract."
>
> *Bekins v. Lindsay-Strathmore Irrigation Dist.*, 114 Fed. (2d) 680 at 683.

Defendant Liebman was ready and willing to pay the liquidated sum of $1438.52 to whichever of the rival claimants to the fund was entitled to it. Both had made claims against him. (Tr. p. 39.) He refused to pay until there was an agreement between the parties or an appropriate order of a Court. He could

gain nothing by voluntarily paying the money, except the gratitude of a creditor who got its money with little effort.

In their efforts to assert their rights to the fund, the trustee of the bankrupt Aetna and the plaintiff had reached an impasse. The referee in bankruptcy would not rule on their divergent contentions until the fund was before the Court. It was necessary to get the fund before the Court if either was to prevail before the bankruptcy tribunal, and apparently both thought such a means of litigation would be preferable to a suit at law under the Miller Act. Apparently the plaintiff was more confident of its position as it induced the defendant to pay the money in order to avoid a suit.

The plaintiff prepared the agreement. (Tr. p. 68, Def. Exhibit A-3.) The defendant was to pay the money to the trustee. The trustee was to hold the fund separately "earmarked" so that it would immediately be available to the plaintiff if it prevailed on its claim for preference. The Court was to rule on the litigation. Everything was planned and set up to forever end the controversy.

Since the plaintiff prepared the stipulation, the words thereof must be construed most strongly against it.

> "In California, the words of a contract will be taken most strongly against the party who employs them. Sec. 1654, Civil Code of California."
>
> *Flotation Systems v. U. S. for Use of Pollia,* 136 Fed. (2d) 483 at 484.

See also:

Payne v. Newal, 155 Cal. 46, 99 P. 476.

It is significant that the plaintiff, if it desired to reserve its rights under the Miller Act, did not embody such a simple statement in the stipulation. Good faith on the part of the author of the instrument must be assumed, for to do otherwise one would have to assume that an unscrupulous preparer of the instrument cleverly omitted such a provision so that the stipulation could be foisted upon the unsuspecting defendant. Certainly, an attorney would never advise a client in the defendant's position to voluntarily pay a sum of money under an agreement where strings were attached when to refuse to pay could not possibly injure such client. It is unthinkable that plaintiff's attorney deliberately set a trap for the defendant in the preparation of an instrument which would mean one thing when compliance was induced and another after the money was paid and the plaintiff frustrated in getting it.

The defendant relied on the stipulation so prepared by the plaintiff and which purported to represent the intention of the parties to fully end the controversy and paid his money. Under such circumstances any ambiguity or omissions in the instrument should be resolved in favor of the defendant.

> "A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to himself."
>
> *Noonan v. Bradley,* 76 U. S. 394, 19 L. Ed. 757 at 761.

In

Kansas City Marble & Tile Co. v. Penker Const. Co., supra,

the executed waiver did not expressly waive a claim under the Miller Act, yet the Court found that the conduct and actions of the parties were sufficient to raise an equitable estoppel.

In

United States for Use and Benefit of Noland Co. v. Wood, supra,

the three-way agreement made no mention of waiver or release, yet the Court, without passing on the question whether there was in law a waiver of rights under the Miller Act, found that under all the facts an equitable estoppel would arise.

It is earnestly submitted that all the circumstances indicate that the parties intended and construed the stipulation to mean that it was a release and a waiver as to defendant Liebman, and all acted under such interpretation.

The plaintiff's own interpretation of the stipulation as is indicated by its subsequent course of conduct is highly significant. After the money was paid it resumed its litigation in the forum of its choosing, i.e., the Bankruptcy Court, where it reasserted its priority claim to the fund. (Tr. p. 43.) The Bankruptcy Court rejected the plaintiff's contention for priority, and thereupon the plaintiff appealed from such decision to "Court of Appeals" (apparently District Court intended). (Tr. p. 43.) It was not until the plaintiff's

position was held untenable on appeal that it instituted this suit. (Tr. p. 9.) The plaintiff's tenacity and persistence in its efforts to reach the fund irresistibly impels the conclusion that until its frustration in the Bankruptcy Court it interpreted the stipulation as being a full and complete release of claims against the defendants.

Construing the stipulation most favorably to defendant since the plaintiff was the author of it with all the facts and circumstances, a release and waiver should be implied from its terms.

E.

In order for the plaintiff to maintain this suit it must allege and prove an appropriate notice of the unpaid indebtedness was duly served on the defendant and the defendant's surety within ninety days after the material or labor was furnished.

Title 40, Section 270(b), *U.S.C.A.* (Miller or Heard Act).

The serving of such a notice is a jurisdictional prerequisite to the bringing of the action, and failure to allege and prove such a notice is fatal to sustaining the action.

U. S. for the Use and Benefit of John A. Denie's Sons Co. v. Bass et al., 111 Fed. (2d) 965;

U. S. ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 34 S. Ct. 550, 552, 58 L. Ed. 893.

The plaintiff served such a notice (Tr. p. 65; Plaintiff's Exhibit 11) on May 24, 1943. The defendant complied with such notice and withheld payment of the money claimed to be due until December 29, 1943, when he was authorized and directed by the plaintiff by the terms of the stipulation to pay the specific money so held to the trustee in bankruptcy of the Aetna Electric Company.

By so authorizing the release of the fund the plaintiff either withdrew or waived the effectiveness of the notice in the same manner that one who has a possessory lien loses that lien when he yields possession of the property held. The notice therefore no longer had vitality or legal force.

The instant suit was filed and bottomed upon the only statutory notice given, and without any attempt to serve an additional notice or to revitalize the old one. The suit must therefore fail because of the absence of this jurisdictional prerequisite.

CONCLUSION.

To hold that the defendant must twice pay this debt would be to penalize persons who, in good faith, have relied on the representations of their fellow man and have attempted to honestly settle their differences.

> "It ought to be and is the object of Courts to prevent the payment of any debt twice over."
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> *Huron Holding Corp. v. Lincoln Mine Operating Co.,* 312 U. S. 183 at 189, 61 S. Ct. 840, 85 L. Ed. 725;
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> *Harris v. Balk,* 198 U. S. 215 at 226, 25 S. Ct. 625 at 628, 49 L. Ed. 1023.

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November 19, 1945.

Respectfully submitted,
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